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Reforming Divorce Law

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EXECUTIVE SUMMARY

Marriage has evolved from a relatively stable bond to a highly uncertain one. High divorce rates, the substitution of cohabitation for marriage, later ages at marriage, falling fertility and the ill effects of family instability on children and adults have occurred in conjunction with social and economic changes, including changes in family law.

- The 1975 change to unilateral, no-fault divorce is identified as a factor in marital instability and high divorce rates. It has created uncertainty about the durability of marriage, loss of confidence in it and opened up new opportunities for spouses to exploit each other opportunistically.

  Women substantially committed to a 'traditional' or 'neotraditional' marriage combining children and domesticity with workforce participation are vulnerable to disadvantageous divorce settlements, while men are vulnerable to losing contact with their children.

- Reform should retain no-fault divorce where the spouses are agreed that they want to divorce, but remove unilateralism by requiring that all divorce applications (after the usual one year's separation) have the consent of both husband and wife.

- Where there is not mutual consent to divorce, unilaterally leaving a marriage would constitute serious marital misconduct, that is, desertion (unless the spouse concerned has been driven out of the marriage by the other spouse's misconduct). The deserted spouse could apply for divorce after one year's separation and claim that misconduct should affect the terms of the divorce settlement. Also, if other forms of serious misconduct have occurred, it would be open to a spouse to claim and prove the misconduct. If proven, the Court could award damages via the divorce settlement.

- A survey of 5,700 adult men and women shows that three out of four—across various age groups, men and women, the married and the unmarried, and those with or without children—believe that serious misconduct in marriage should influence a divorce settlement.

- The objectives of the reforms are:
  (i) to recognise the reality and damage of serious marital misconduct, to discourage it and to compensate the victims as far as possible, but without requiring proof of misconduct as a condition of divorce;
  (ii) to end unilateralism;
  (iii) to establish a balance of incentives and disincentives in family law that will help to stabilise marriages and restore confidence in marriage as a dependable bond between a man and woman.

Barry Maley is Senior Fellow at The Centre for Independent Studies (CIS), and former Director of the Centre's *Taking Children Seriously* research programme, completed in 2001. This paper is an edited extract from his forthcoming book Divorce Law and the Future of Marriage to be released later this year. His most recent book is *Family & Marriage in Australia* (CIS 2001). The usual disclaimers apply.

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REFORMING DIVORCE LAW

At the heart of the growing disarray of the Australian family is the decay of marriage.

Marriage today is fragile, delayed for longer, increasingly displaced by cohabitation and bereft of meaning for more and more young adults. More than one in three marriages will end in divorce. Cohabiting/de facto relationships are even more unstable.

About 30% of children are living with unmarried parents or a single parent. Close to one child in three is living apart from one of its natural parents, mostly the father.

Average age at marriage in 1970 was 23 for men and 21 for women. Today, it is 31 for men and 29 for women. About one in four men and women will never marry. In 40-odd years the birth rate has halved, from 3.4 children per woman to 1.73 per woman.[1]

Family breakdown represents a massive body of child and adult misery and unhappiness. It is a common factor in wider social problems of crime, suicide, violence, poverty, child abuse and educational underperformance.

Over the last 30 years, marriage and family life have been transformed by a variety of social, cultural and economic changes. In conjunction with the advent of no-fault divorce in 1975, these changes have powerfully contributed to the fragility of marriage.

No single measure will repair this fragility, but we have it in our power to change four things that will make a difference. The first is to radically reform the punitive rates of taxation and the burden of paying for welfare that now afflict middle-income, working families with dependent children. The second is to reduce unemployment. The third is to reform divorce law. The fourth is to restore marriage as the preferred environment for rearing children. This paper deals with these third and fourth issues.

Current divorce law has introduced a number of perverse incentives for behaviour that undermines confidence in marriage and sustains high divorce rates. It promotes marital uncertainty, opportunism and forms of spouse exploitation. This paper proposes reforms which retain the essentials of no-fault divorce provided both spouses agree to divorce, and, in addition, provide an option for spouses who have been victimised by serious misconduct to raise this as an issue which might affect a divorce settlement.

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Divorce before 1975

Prior to 1975, under 'fault' divorce rules then in place, it was necessary for a husband or wife to prove that fault (serious misconduct) had been committed by his or her spouse in order to win a divorce. There were 14 forms of misconduct defined in the law, but the most common causes of action were desertion, separation for five years in certain circumstances, adultery and cruelty.[2] Without proof of fault, a divorce would not be granted. Fault divorce meant that only the 'innocent' party could apply for a divorce, and fault by the other party either had to be admitted or proved by the applying party before the court. If fault was admitted or proved, it would be open to the court to award a more favourable property settlement and/or alimony to compensate the spouse who was the victim of fault.

In many cases prior to 1975, a spouse wishing to divorce a spouse who wanted the marriage to continue might persuade the unwilling spouse to collaborate in faking evidence of fault so that the court, on the basis of an application for divorce filed by the unwilling spouse, would permit the divorce. Persuasion might involve 'buying' the agreement of the unwilling spouse by offering a favourable, privately agreed divorce settlement. An implication of this practice is that the spouse who wanted the marriage to continue possessed, in effect, a 'property right' over the marriage that the spouse who wanted to divorce had to 'purchase'.[3] Where this happened, faked evidence of fault (for example, photographs of an 'adulterous' situation) would be presented to the court, guilt would be admitted, and the court would grant the divorce under the prior, privately agreed settlement terms without an adversarial court contest being necessary. Contesting a divorce was vexing and expensive. It has been estimated that under no fault rules prior to 1975, 90% or more of divorce applications were not contested.[4]

Another method of faking fault in cases where both wanted to divorce would be for one spouse to leave the family home and the other spouse, after a period of absence, to apply to the court for 'restitution of conjugal rights'. In fact, restitution was the last thing he or she wanted, so the court had to be lied to. If the absent spouse refused to obey a court order to restore conjugal rights (as both spouses had privately agreed would not be done), a divorce would be granted on fault (desertion) grounds and the terms of settlement agreed by the spouses submitted to the Court.

For obvious reasons, we have no statistics on the frequency of faking fault. Although dishonest and illegal, it was a cheap and relatively simple course open to a couple who were agreed that their marriage had failed, and it is likely that it was not uncommon. For example, on 15 November 1973, *The Sydney Morning Herald* reported a gaol sentence imposed on a private inquiry agent who, for a fee, had faked an adultery set-up designed to influence the hearing of a property settlement in divorce proceedings.

Settlement bargaining under fault divorce

The opportunity to bargain a divorce settlement in this way allowed each spouse to have a say about its terms and to protect his or her interests as much as possible in difficult and unhappy circumstances. Apart from the illegality of faking, this mimicked common practice in dealing with the wash-up of a broken commercial contract. Rather than sue for breach of contract and go to the expense of litigation, the contracting parties might work out a settlement arrangement whereby the party damaged by the breach would be offered enough compensation by the breaching party to dissuade against recourse to litigation.

Marriage, or at least 'traditional' marriage, shares many of the features of a contract. The pre-1975 fault system made possible (although illegal) what amounted to divorce (breach of contract) by mutual consent. It is important to note that the opportunity to bargain about the terms of the divorce settlement under these circumstances worked towards balancing the interests and powers of both parties in negotiating the dissolution of the 'contract'. This reduced the scope for exploiting a weaker or more vulnerable spouse unwilling to divorce unless his or her interests were protected. It also forced both spouses to confront all the costs of divorce, with the possibility of second thoughts. If proceeded with, the outcome was likely to be a fairer, more optimising settlement for both spouses and children. A voluntary settlement agreement is evidence that both parties have achieved the best available result under the circumstances of a failed marriage.

The advent of no-fault divorce and its consequences

The Family Law Act 1975 banished the need to prove serious misconduct (fault) to get a divorce. It removed the dishonesty and illegality of faked fault. The only requirement for divorce became evidence of 'irretrievable breakdown' of the marriage demonstrated by the separation of the spouses for one year. Either spouse could apply for a divorce, or both could apply together. In practice, the great majority of divorces are *unilaterally* invoked with only one spouse making the application in almost four out of five divorces.[5]

The change to no-fault inverted the former juxtaposition of the spouses and their relative powers. Either spouse could now end the marriage unilaterally without any issue of fault or misconduct arising and without needing the consent of the other spouse. The spouse who wanted to leave had now acquired the 'property rights' in the marriage and the spouse who wanted the marriage to continue had lost leverage for protecting his or her interests in bargaining over the terms of the divorce settlement.

Allen Parkman observes similar consequences in America under no-fault:

> No fault divorce reduced the bargaining power of spouses who did not want to divorce, with the potential of shifting some costs of divorce from the divorcing spouse to the divorced spouse.[6]

The move to no-fault meant that serious misconduct in a marriage became legally irrelevant. Despite the continuing reality of serious marital misconduct, its costs and damages were no longer recognised by family law. It put an end to redress and compensation. It therefore removed a disincentive to irresponsible, selfish, or malicious behaviour within a marriage. It diminished the 'contractual' element in marriage and the presumption that marriage entailed obligations and duties whose dereliction might bring punitive consequences. By removing the consensual settlement possibilities of fault divorce, it disempowered a non-consenting spouse by closing the opportunity for bargaining mutually satisfactory terms to end a marriage.

Opportunistic divorce

For both men and women so inclined, the coming of no-fault divorce created new scope for opportunistic behaviour without penalty. 'Opportunism' here means self-serving conduct which reaps a personal benefit at the expense of one's spouse, and perhaps children as well.

The move to no-fault divorce meant that that serious misconduct in a marriage became legally irrelevant.

Margaret Brinig and Steven Crafton observe:

> The types of resulting opportunistic behaviour that could be predicted in such an illusory marriage contract involve situations where one spouse leaves shortly after the other has worked to allow his or her graduate education, where one spouse has swindled the other systematically of assets for a separately held business enterprise, where there is adultery, or where there is spousal or child abuse.[7]

To which we might add such things as: leaving a spouse for someone in better health; divorcing and marrying again for money; leaving an older spouse for someone younger and more desirable; divorcing to escape from poverty; or deserting a family at a time of economic problems (such as unemployment or collapse of a business). In short, if a spouse wants to seize self-interested benefits through divorce at the expense of the legitimate expectations of his or her spouse and children, no-fault, unilateral divorce provides the opportunity without legal sanctions or constraints upon doing so.

Gender roles and marital exploitation under no-fault rules

Both men and women are exposed to various forms of exploitation by divorce under present no-fault rules.

Both men and women are exposed to various forms of exploitation by divorce under present no-fault rules. However, there are two gender-based forms of exploitation which arise from the substantially different roles of husband and wife.

Right up to and including the present, marriage for most couples has meant varying degrees of division of labour between husbands and wives, with the husband/father as the prime source of earned income and the wife/mother as the main producer of domestic services and child care. Specialisation brings economies and efficiencies. Each partner becomes expert and proficient in their different forms of production and each benefits from the other's skills, through the money earned, the cooked meals, the cleaned house and the children cared for. Along with this division of labour come mutual support and economies—cooperation in child care, a single household, one refrigerator instead of two, one television set, one telephone bill and so on. Indeed, economists have seen the division of marital labour and the efficiencies and extra welfare it produces as crucial to the benefits of marriage, the capacity to care for children and to reinforcing the bond between the spouses.

Clearly, the frequency and character of the traditional division of labour in marriage have changed considerably over the last 50 years. With or without children, a substantially increased proportion of married women has jobs, either full-time or part-time. More mothers with dependent children are working, mostly part-time when their children are not in school, and increasing their work hours as their children grow up. More children are receiving out-of-home child care. For most women, therefore, the fundamental choices in marriage are domesticity and the care of children, or commitment to work and career, or some combination of both, with oscillation towards or away from these choices over a woman's life cycle.

In general, however, the persistence of the traditional division of labour is still widespread and surprisingly stable over recent years, especially in households with dependent children. Data from the HILDA Survey[8] show that for employed husbands and wives in their 30s who have children, average weekly hours of employment are 47.56 for the 90% of the men in this group, and 27.85 for the 61% of wives in employment. This implies that 39% of mothers in this group are at home full-time or virtually full-time, while the employed 61% are devoting a considerable proportion of the balance of their time and effort to domestic work and child rearing—the 'double shift'. This means that married men with children, with few exceptions, are continuing to live 'traditional' married lives entailing full-time work and the building of a career. The majority of their wives, now more highly educated than ever and with a wider range of employment opportunities open to them, are either dividing their time between work and domesticity or staying at home full-time. Robert Drago calls this the 'neotraditional family',[9] the modern prototype within which a substantial, gender-based division of labour stubbornly remains along with significant workforce participation by the majority of mothers. The work of Mariah Evans in Australia and Catherine Hakim in Britain confirms such findings.[10]

Two things are plain. For employed men, a husband's specialisation in income-earning and in increasing the scope of his human capital and future earning capacity through an uninterrupted career builds a valuable asset that is his alone and portable. On the other hand, a woman's specialisation in domestic work and child-rearing usually entails the erosion of her marketable human capital and income-earning capacity. The more children she has, the greater the loss. A rational woman in these circumstances, wanting to protect her future and way of

life, would therefore value institutional safeguards against the loss of her partner, the collapse of her marital expectations and the prospect of rearing children alone in conditions of relative impoverishment. Traditional marriage, under fault-based divorce rules and access to alimony in the event of break-up, used to provide those institutional guarantees—if not completely, then certainly to a greater extent than at present. It is likely for a great many women that reduced marital protection, the rising relative costs of children and the opportunity costs of sacrificing employment by a working wife are eroding female domestic specialisation, lowering birth rates and undermining the incentives for marriage.

Women and divorce settlements

As Ailsa Burns has observed:

> The [1975] Family Law Act changed the fundamental principles on which financial and residence/contact ['custody'] settlements were made, both in the divorce courts and the magistrates' courts. Under the old legislation a matrimonially 'innocent' wife was entitled to 'handsome maintenance' from her 'guilty' husband, even where she was well able to support herself; a 'guilty' wife, on the other hand, was not normally entitled to maintenance unless she was responsible for young children and unable to support herself. The Act reversed this policy and changed the emphasis to need rather than matrimonial conduct. The economically stronger spouse is now only obliged to support the other to the extent that he or *she* is reasonably able to do so, and only if the party claiming maintenance cannot support himself or herself adequately because of responsibility for minor children, age, or incapacity, or 'any other reason' (emphasis in the original).[11]

This raised questions about the long-term consequences of this change in the 'fundamental principles' referred to above by Burns. In particular, whether the Family Court, now that marital conduct was irrelevant, would tend to make determinations of property settlements simply on the basis of financial contributions to the acquisition of property both before and during marriage; whether there would tend to be systematic differences between husbands and wives; and whether 'traditional' domestic-specialisation wives would be specially disadvantaged.

Australian evidence suggests that the answers to these questions are in the affirmative. Survey data collected and analysed by Grania Sheehan and Jody Hughes and others at the Australian Institute of Family Studies indicate that:

- domestic, full-time mothers tend to be disadvantaged when marital property is distributed at divorce either by agreement or Court determination;
- while the needs of dependent children are generally catered for as much as possible, the financial needs of the mother/wife tend to be overlooked where non-domestic assets comprise a high proportion of the couple's wealth;
- women playing a traditional domestic and child-caring role receive shares of marital property 'well below the mean share for women overall'.[12]

Domestic, full-time mothers tend to be disadvantaged when marital property is distributed at divorce.

The conclusion to be drawn is that women in 'traditional' or 'neotraditional' marriages where spousal specialisation is common may be exposed to disadvantageous property and financial settlements following the advent of no-fault divorce. Where the husband has contributed most to the acquisition of non-domestic assets and investments and retains the bulk of these assets, it is likely that a traditional wife will lose, upon dissolution, the future lifestyle *expectations* she would legitimately have had if the marriage had continued, even though she may receive a distribution recognising her contribution to *domestic* assets plus a further amount to meet her (and perhaps her children's) future 'needs'. Such settlements, particularly for traditional marriages, and especially where children are involved, might systematically disadvantage housewives with lesser capacity and opportunity for earned income in comparison with their husbands. Additionally, they could face the costs and responsibilities of child residence and lifestyle reductions insufficiently recognised under a 'needs' formula rather than an 'expectations' formula when the divorce is settled.

To sum up, the realities that women confront today are that:

- divorce affects more than one in three marriages;
- wives who specialise in child-rearing and domestic production are more likely to be disadvantaged at divorce settlements and more vulnerable to post-divorce impoverishment;
- substantial specialisation is inevitable for most women when children are born;
- mothers are much more likely than fathers to have residence of children after divorce, more

likely to have difficulties meeting the expenses and work demands of raising them, and more disadvantaged in finding another partner;
- the real costs of raising children, and the opportunity costs of having to give up work, have greatly outpaced public support (through the tax and transfer system) for dependent children;
- for most women, divorce means a substantial decline in standards of living unless they are able to re-enter the workforce on favourable terms and avoid the costs of child-rearing.

A rational response by a young woman aware of these facts, including a woman initially preferring a 'traditional' or 'neotraditional' marriage with children, would be to:

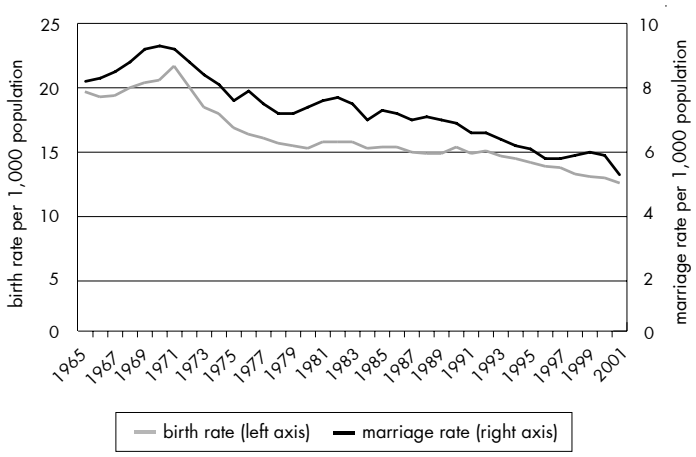
- cohabit and delay or avoid marriage;
- invest less in marriage (or cohabitation) and domestic specialisation;
- seek advanced education, prepare for a career and maintain and improve her job skills;
- keep working if she gets married or cohabits;
- abandon the having of children or have fewer than she would have liked;
- protect her options for comfortable exit in the event of marital (or cohabitational) dissatisfaction, or an opportunity for a better partnership;
- be reluctant, if married, to act in support of advancing her husband's career (that is, as a marital investment) at the expense of her own improvement and her possible post-divorce or separation future.

As women and men may be driven by marital uncertainties to invest less in building a home and having children, marriage comes to offer less meaning and satisfaction to both spouses. Divorce becomes more likely, and marriage and birth rates fall. Indeed, the statistical connection between falling fertility rates and falling marriage rates between 1965 and 2001 is very close, with a correlation coefficient of .95.

The statistical correlation between falling fertility rates and falling marriage rates is very close.

In the present Australian context, whether or not to have children is the key dilemma for women. The presence or absence of children will largely determine the work and career paths that

Figure 1. Marriages and Births, 1965-2001
crude rates per 1,000 population



Source: Australian Bureau of Statistics, *Marriages and Divorces Australia, Births Australia*, various years.

women may follow, their financial independence and their vulnerability within a divorce and family law regime that offers mothers less protection than before. Protection for this at divorce should be one of the objectives of any proposals for divorce law reform. Given that protection, a disincentive to having children will have been removed for those women preferring a traditional or neotraditional life within marriage.

Custody (residence and contact)[13] and men

Men are made vulnerable under no-fault divorce by the prospect of losing contact with children they have loved, protected and helped raise.

Under present circumstances, a wife may leave a marriage for various reasons, stay away for a year, apply for a divorce, be awarded ownership of the family home and child support payments

and gain residence of the children with her. A conscientious husband and father, not guilty of misconduct, may find himself struggling to gain regular access to his children, to have them stay with him on occasions and be frustrated by an ex-wife who is uncooperative for self-serving reasons or for revenge. A similar situation might arise out of an acrimonious divorce with intense, antagonistic emotions on both sides, followed by a struggle over custody (that is, residence and contact) where primary care of children is awarded to the ex-wife, with contact visits allowed to the ex-husband. The embittered mother may put difficulties in the way of visits and overnight stays by the children and the father accordingly loses regular contact with his children.

The issue of custody (residence and contact) and substantial, regular father-child contact has been a running sore for many years, with constant agitation by fathers' groups for reform of a system which some fathers see as responsible for denying them, and their children, the contact and continuing intimacy that both once enjoyed. At the time of writing, the Federal government has announced an inquiry into the desirability of legislating to establish a presumption by the Family Court of 'rebuttable joint residence'. One of the arguments put forward for moving in this direction is evidence from America which shows that in some states where joint residence is provided for, the divorce rate has fallen.[14] If there is a direct connection between joint residence and lower divorce rates, this might indicate that wives who would readily divorce in the firm expectation that they would have primary custody of their children are less prepared to do so in the absence of that assurance.

Whatever the outcome of the Federal inquiry it will, under present divorce rules, ignore the question of custody where one of the spouses has committed serious marital misconduct. This is an issue discussed in a later section of this paper.

The problem of unilateralism

The abolition of fault as an issue in divorce was a seductive idea. Matrimonial fault is not easy to define and is difficult to prove and adjudicate. Removing these difficulties and reducing the expense of divorce looked like an attractive initiative. It seemed to many that spouses who were agreed that their marriage was barren of pleasure and satisfaction should be allowed to end their relationship in dignity and privacy without the necessity of a court battle to prove serious misconduct—often by faked misconduct and perjury with the reluctant complicity of barristers and judges. Serious misconduct is not an issue for many of them, and even in some where it is the cause of estrangement, a swift 'clean break' without a contest may be the partners' preferred course. There is much to be said in favour of a no-fault approach to failed marriages. Nevertheless, there would no doubt be many remaining for whom serious misconduct is a reality, and the lack of acknowledgement of its material and psychological costs is a significant injustice.

Much can be said in favour of a no-fault approach to failed marriages. Nevertheless, there would no doubt be many remaining for whom serious misconduct is a reality.

The problem of no-fault divorce lies in its unilateralism—the opportunity it provides for a decision by one spouse to invoke divorce against a partner who may not wish to separate or to have separation forced under conditions of powerlessness and disregard for that partner's interests in the marriage, and perhaps the interests of children as well. We do not know how often this might happen. Of the 55,330 divorce applications lodged in 2001, 77% were lodged by one person (husband or wife) and 23% were joint applications.[15] Children are involved in approximately half of all divorces.

We cannot infer that all of the applications lodged by only one person represented unilateral decisions to apply for divorce. But it seems reasonable to suppose that a percentage, maybe a high one, did. 'Desertion' was one of the most common causes of separation and divorce under the pre-1975 regime, despite the serious misconduct it legally constituted and the penalties it might attract. In the absence of illegality and penalty under the present regime, might not we expect more of it?

The power to act unilaterally is a fatal flaw. Unilateralism promotes self-interest at the expense of mutual investment and cooperation, and works against the marital specialisation and the having of children that are the foundation of much of the welfare benefits and meaning of marriage. It encourages focus on the short-term rather than the long-term, because there is a greater risk that there will be no long term. Those who offer commitment and permanency are put at risk, and what they may give to a marriage can count for little when unilateral divorce is forced upon them.

Two of the key accompaniments of the previous divorce regime—compensation for fidelity and commitment betrayed and the negotiating leverage of a non-consenting spouse—have disappeared. With their going have gone also some vital incentives for fair and responsible marital conduct and balanced negotiating power over the terms of settlement in divorce. Also,

in one out of every two divorces, a third party—the children—stands by silent and powerless while their family life is unilaterally destroyed.

The outcome of the no-fault initiative has been a marital regime that erects perverse incentives that undermine the very motives and conditions that successful marriages need. Instead of confidence it provokes wariness; instead of predictability it provides uncertainty; instead of encouraging investments for shared benefits it encourages self-interest; instead of cooperation, divisiveness. It substitutes 'protective individualism' for altruism. It invites spouses to look away from common interests in favour of behaviour designed to protect oneself against the likelihood and consequences of divorce. It allows opportunism to flourish because there are no penalties for its expression.

Requiring consensus by the spouses gives each an equal voice in the separation negotiations.

Objectives of reform and their implementation

Reform should strive to restore the status of marriage and confidence in it as a dependable human bond and the best nursery for children. It should deal justly, and realistically, with marriage failure. This means retaining the essentials and benefits of the present no-fault regime while meeting the need to:

(i) deal with the problem of unilateralism by consensual application for divorce, equalising the negotiating power of each spouse in determining the terms of their divorce settlement;
(ii) find a method of recognising, redressing and discouraging serious misconduct in marriage (that is, breach of the marriage 'contract') without returning to the necessity of demonstrating fault before a divorce can be granted.

Unilateralism can be ended by requiring, where both spouses are agreed that separation is in their best interests and serious misconduct is not an issue, that both must jointly submit an application for divorce. They must declare either that they have reached an agreement about the terms of settlement for approval by the Court, including arrangements for any children involved, or jointly request the Court to determine the terms of settlement. One would expect that the latter would be rare.

Requiring consensus by the spouses gives each an equal voice in the separation negotiations. It also has the benefit of ensuring that both spouses are forced to confront all of the costs and difficulties of separation for themselves, their partner and any children, and either hammer out a mutually satisfactory agreement or think again about divorcing. Reaching agreement without recourse to litigation would be more likely to lead to as amicable a parting as can be expected and a more agreeable post-divorce situation, particularly for children. Ending a marriage in this way models regular practice in commercial circumstances when one party or both parties to a contract want to breach or end the contract without going to court.

But what if one spouse wants to divorce and the other does not? What would happen?

One option would be for the spouse who wants the divorce to offer generous settlement terms to the spouse who is reluctant in order to win his or her agreement. But if this fails, the one who wants to leave could simply do so. In other words, they could desert his or her partner. Under the rules proposed here, this desertion would constitute, *prima facie*, 'serious misconduct' within the marriage (along with other forms of misconduct, to be defined), and brings us to the role of 'fault' in a reformed divorce regime.

Let me say at once that there is no suggestion here of returning to proven fault as a necessary condition for the granting of a divorce, as was the case under pre-1975 divorce law. One year's separation of the spouses would remain the fundamental essential condition for all divorces, along with either a consensual application by both spouses to divorce, or a solo or joint application after one year's separation where an issue of fault (serious marital misconduct) is to be raised as a matter which *may affect only the terms of settlement* of the divorce. Misconduct would be dealt with as follows.

In the instance where one spouse deserts the other, after one year's separation the deserted spouse could apply for a divorce and, if he or she wishes to do so, could claim and seek to prove before the Court that the marriage had been destroyed by desertion and ask the Court to award 'damages' for his or her lost marital expectations as part of the divorce settlement. Whether or not misconduct is proved, and whether or not damages are awarded, the marriage would be ended on the basis of the one year's separation.

In other instances of serious misconduct (for example, adultery, abuse, cruelty, habitual intoxication and so on) a spouse whose marriage has been made intolerable could apply for

divorce after one year's separation, seek to prove the marital misconduct and, if proved, ask the Court to award damages. If the misconduct is not proved, the marriage would be dissolved without damages and the terms of settlement determined by the Court or by agreement between the spouses.

A further possibility is that each spouse may claim marital fault by the other. Again, after one year's separation, either or both could apply for divorce and contest the claims of misconduct before the Court as an issue to be taken into account in settling the terms of the divorce. The Court would make its judgement on the competing claims, decide the issue of damages and could either determine the terms of settlement, or if the Court dismisses the claims of misconduct, give the parties the option of reaching a settlement agreement among themselves or of leaving it to the Court to settle terms.

In practice, it is likely that not every instance of serious misconduct would entail an adversarial contest to prove it before the Court. Where the misconduct is clear and can be readily demonstrated, or even when there is uncertainty about proof, there would be a strong financial incentive, and perhaps a shame incentive, for the guilty party to avoid litigation by agreeing to a consensual divorce application entailing generous settlement arrangements for the victimised spouse. Even under the more restrictive rules of pre-1975 fault divorce where proof of fault was a condition of divorce, only one in ten marriages were ended by entailing a court contest. Under the less restrictive rules proposed here, one would expect even fewer.

The question of settlement 'damages'

In commercial situations of breach of contract, justice is served if the victim of the breach is compensated in some way for the loss of the benefits expected from a completed or ongoing contract. That principle could well be applied to the marriage 'contract'.

As Antony Dnes puts it:

> Awarding 'expectation damages' is indeed the standard remedy for breach [of contract] among commercial parties, and has the characteristic of placing the parties in the position they would have been in if the contract had been completed . . . All the traditional marital offences, such as adultery, unreasonable behaviour and abandonment, would be relevant to a divorce system based on classical breach of contract, in determining who had breached. Equally, no-fault divorce would be consistent with the notion of effective breach as it would simply represent either (i) a decision by one party to breach the marital contract and pay damages, or (ii) a mutual decision to end the contract with a negotiated settlement.[16]

If contractual justice can be delivered to the merest business deal, why not to the most important contract that most of the population will ever make?

The proposals being made here are to preserve a no-fault regime with a jointly negotiated settlement whilst recognising fault and its consequences as an issue that may affect the terms of a divorce settlement. Where fault (breach of contract) has been shown, the redress due to the spouse whose marital expectations have been shattered would be such as to compensate her or him by assessing those expectations and 'restoring' them as much as is possible and practicable within the resources at the disposal of the breaching party (subject to protecting the interests of any children as well). In many cases of fault, the resources of the marriage and its partners may be so limited as to make adequate compensation for lost expectations out of the question. But some compensation, even if no more than a formal declaration by the Court that serious damage has been done to an innocent party, is better than nothing. If contractual justice can be delivered to the merest business deal, why not to the most important contract that most of the population will ever make?

Fault settlements and custody

Important issues would arise in determining a fault-based settlement if custody (residence and contact) of dependent children should be involved. One of those issues is the interpretation of the 'best interests' of the children in delivering a just outcome to all parties in circumstances of fault.

For instance, let us assume that a wife has committed serious misconduct which is not of a kind to indicate that she is an unfit mother of her two dependent children. In principle, under the rules proposed here, the innocent husband would have an entitlement to 'expectation' damages. But the resources of the family are minimal, consisting primarily of some furniture and a home under mortgage. The wife does not work, has no significant assets of her own and no income. The husband works and has an average income.

If present Court practice of ignoring marital conduct were to continue, in all likelihood the mother would be given residence of the children in the family home and the father given rights of contact with his children and occasional stay-overs, because doing this would be in the 'best interests' of the children. On such a ground the Court would probably also decide, given the 'needs' of the mother and children, that the father should contribute to the upkeep of his former wife as well as his children.

Is it fair and reasonable that the victimised father should be expected to maintain his 'guilty' ex-wife and his now-separated children, to continue to pay the mortgage charges, to leave the family home and to pay rent for a separate residence for himself? If this were to be the case, the father would be doubly victimised. His marriage and its expectations have been destroyed, he has largely lost his children, lost his home and a large part of his income. His prospects of mending his shattered and impoverished life, re-partnering and perhaps having other children, are minimal.

The children's interests should be protected as far as possible *within the context* of other legitimate claims.

Is there any way in which the former husband's legitimate interests can be protected and the interests of the children as well? What should be expected of the former wife?

Under the rules proposed here, there would be a clear obligation upon the former wife to mitigate or recompense the losses to her former husband as far as she reasonably can. Some possible courses of action open to the Court and the wife are:

- to surrender to her former husband her property interest in the family home and to forgo any claim to residence in it;
- to work, depending upon the ages of the children, part-time or full-time;
- to agree to joint residence of the children, or to offer her former husband primary care of the children;
- to pay rent to the former husband if permitted to reside in the family home, or to accrue a debt for rent not paid;
- to contribute a proportion of any income she earns to the upkeep of the children until they reach the age of 18.

The problem, and duty, for the Court would be to explore the range of options, and to acknowledge and adjust what is due to the husband while protecting the well-being of the children. The children's interests should be protected as far as possible *within the context* of other legitimate claims and the conduct of the former wife. The Court should place obligations upon the mother for redress or mitigation without being harsh or unpractical. If the only way in which a fair adjustment for both the father and the children can be achieved is by the awarding of primary custody to the father, with an obligation upon the mother to contribute to the upkeep and rearing of the children, then it would seem that such an option should be considered. The intention here would not be simply to punish the mother, but to oblige her to relieve as far as she could the severe and undeserved punishment that would otherwise be inflicted upon the father as a consequence of her misconduct, and to do so without jeopardising the children's interests.

Attitudes to fault-based divorce settlements

Some may have misgivings at the prospect of even a small fraction of divorces involving proof of fault. A generation has passed since fault was an issue in divorce. In that time, the practice of ignoring marital conduct has become firmly entrenched in policy, the law and seemingly in public acceptance. Attitudes towards marriage seem to have changed quite markedly, and a much more relaxed stance towards the conduct of relationships has gained ascendancy. It might be expected, therefore, that any suggestion of again recognising fault as an important issue in marriage and divorce, even in the limited way suggested here, would be speedily rejected as an unacceptable retreat to the past. On this score we have some indications of public opinion.

In February/March 2003, ACNielsen conducted one of its regular (twice-yearly) Australian Internet User Surveys on a variety of subjects, using a large sample of Australian internet users. The survey[17] achieved a sample size in excess of 5,700 respondents, and although caution needs to be exercised when making whole population estimates from a sample size like this, external validity checks suggest that the final weighted sample is reasonably representative of the Australian population as a whole. The Centre for Independent Studies commissioned the inclusion of a number of questions in the survey. Among these questions was the following:

It has been suggested that serious misconduct in a marriage (for example, desertion, adultery, drunkenness or abuse) should be taken into account when the Family Court decides the settlement following a divorce. Select one of the following: Strongly agree, Agree, Neither agree nor disagree, Disagree, Strongly disagree, Don't know/no opinion.

There were 5,721 respondents to the question. Overall, three out of four respondents (74.6%) 'strongly agreed' or 'agreed' with the proposition that serious misconduct should be taken into account at a divorce settlement, as shown below.

Table 1. ACNielsen Survey February - March 2003
Percentages 'Strongly agreeing or Agreeing'

Overall percentage: 74.6

Percentage breakdown by:

Age	*18-24*	*25-34*	*35-44*	*45-54*	*55-64*	*64-79*
%	80.64	77.04	72.66	67.99	76.71	81.8
Children	*With Child under 18*		*Without Child under 18*			
%	72.82		75.71			
Sex	*Male*	*Female*				
%	72.05	76.47				
Marital Status	*Single*	*Engaged*	*Married*	*Divorced/ Separated*	*De Facto*	*Widower*
%	78.76	80.98	73.82	70.68	70.76	74.71

Strong agreement or agreement with the proposition ranges from 67.99% to 81.8% within all subcategories. This indicates that the principle suggested by the question has strong, widespread support. It seems that a substantial majority of Australians believe that serious misconduct in marriage is an important issue that should not be ignored by the law when it deals with divorce.

Three out of four respondents 'strongly agreed' or 'agreed' that serious misconduct should be taken into account at a divorce settlement.

Conclusion

We have had 27 years experience of our current divorce regime, yet marriage in the past century has never been so precarious, and the consequences of that instability so damaging, especially to children. It would be false and unfair to attribute this wholly to our divorce law. Yet we have seen that its design is such as to make it an accessory to other social trends, and particularly to perennial human failings and motives that destroy marriages unless countervailed and discouraged. A function of well-formed law is to dissuade such human tendencies rather than abet them.

At present, if a man and a woman want more than simple cohabitation and want voluntarily to bind themselves to each other in a firmer compact expressing enforceable marital duties and responsibilities, they are not allowed to do so. That sort of marriage is simply not available under the law. While the law allows a couple to bind themselves to enforceable financial promises in marriage, it will not allow them to make enforceable promises about their conduct to each other. Yet, as the ACNielsen survey suggests, perhaps three-quarters of the adult population believes that reprehensible marital conduct is important and should not be ignored by the law.

The future of the family in Australia depends upon the future of marriage. The fundamental objectives of the reform proposals put forward here are thus:

(i) to enable the option of fault-based settlement to ensure that spouses who have suffered under serious marital misconduct may find acknowledgement and remedy within family law;
(ii) to counter unilateralism in divorce by empowering both spouses through the requirement of consensual application and consensual settlement agreements, or by recourse to a fault-based settlement if a spouse is abandoned or shown to be a victim of other forms of serious marital misconduct;

(iii) to continue to make no-fault divorce a realistic option by putting no expensive or unnecessarily punitive obstacles in the way of couples who, in the absence of serious misconduct, have nevertheless become deeply alienated from each other and want consensually to negotiate their way out of the marriage, whether or not they have children;

(iv) to make divorce less likely by establishing a balance of incentives and disincentives supporting reasonable and responsible marital behaviour;

(v) to promote marital stability and investments and the well-being of children by restoring confidence in marriage as a serious commitment that cannot be unilaterally and opportunistically revoked.

Endnotes

[1] Australian Bureau of Statistics (ABS), *Births Australia*; *Marriages and Divorces Australia*, 2001; Jennifer Buckingham, Lucy Sullivan and Helen Hughes, *State of the Nation: A Century of Change* (Sydney: The Centre for Independent Studies, 2001), pp.15-26.

[2] Australian Bureau of Statistics, *Commonwealth Year Book*, 1972.

[3] Allen M. Parkman, *No-Fault Divorce: What Went Wrong?* (Colorado: Westview Press, 1992).

[4] R. Sackville, 'Murphy's Law', *The Sydney Morning Herald* (5 March 1973), p.6.

[5] ABS, *Marriages and Divorces*, 2001.

[6] Parkman, *No-Fault Divorce: What Went Wrong?,* p.76.

[7] Margaret F. Brinig and Steven M. Crafton, 'Marriage and Opportunism', *Journal of Legal Studies* 23 (June 1994), pp.869-894.

[8] Robert Drago and Yi-Ping Tseng, 'Family Structure, Usual and Preferred Working Hours, and Egalitarianism', Paper presented at the HILDA Conference, University of Melbourne (10 March 2003)

[9] Drago and Tseng, as above.

[10] Catherine Hakim, *Work-Lifestyle Choices in the 21st Century: Preference Theory* (Cambridge: Oxford University Press, 2000); Mariah Evans, 'Norms on Women's Employment Over the Life Course: Australia, 1989-1993', *International Social Science Survey* 1195-1106 (Canberra: Australian National University, 1995).

[11] Ailsa Burns, *Breaking Up: Separation and Divorce in Australia* (Melbourne: Nelson, 1980), pp. 21-22.

[12] Grania Sheehan and Jody Hughes, 'The Division of Matrimonial Property in Australia', *Family Matters* 55 (Autumn 2000).

[13] The term 'custody' has been largely replaced in Australian family law and proceedings by the words 'residence' and 'contact' in dealing with questions of parenting rights and responsibilities after divorce.

[14] Margaret Brinig and Douglas W. Allen, 'These Boots Are Made for Walking: Why Most Divorce Filers are Women', *American Law and Economics Review* 2:1 (2000), pp. 126-69; Richard Kuhn and John Guidubaldi, 'Child Custody Policies and Divorce Rates in the United States', presented at the 11th Annual Conference of the Children's Rights Council Washington, D.C.(23-26 October 1997), see www.gocrc.com/research/spcrc97.html

[15] ABS, *Marriages and Divorces Australia*, 2001.

[16] Antony W. Dnes, 'The Division of Marital Assets Following Divorce', *Journal of Law and Society* 25:3 (September 1998), pp. 336-64.

[17] The ACNielsen/CIS survey is based on a sample of 5,721 Australian residents. These came from or were linked to the Australian Internet User Survey—a survey of internet users who are invited to participate through online advertising banners, hyperlinks, newsgroups and online news items. Our particular sample was achieved in two ways: (a) Between 12 and 27 March 2003, people completing the internet user survey were invited at the end to do the CIS survey as well (4,369 people did so); and (b) Of those completing the internet user survey before 12 March, a random sample of 4,369 were contacted again later to ask if they would like to do ours (1,352 agreed to do so). Full notes on this survey are available on the online version of this paper at www.cis.org.au/IssueAnalysis/ia39/ia39.htm

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